

The Fiscal Objection to Social Welfare Rights: A Closer Look

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I. INTRODUCTION

THOUGH IT HAS been repeatedly asserted that theoretical arguments against recognition of social welfare (SW) rights have been effectively answered,¹ they tend to resurface in implicit fashion in legal doctrine. This chapter argues that at the core of contemporary manifestations of the traditional objections to SW rights is their unique relationship with money. The chapter sheds light on the structure of the current version of the old objections by reviewing judicial rulings in courts in general and in Israeli courts in the fields of health, education and welfare in particular. Focusing on this one particular justification – that objections to social and economic rights collapse into reservations regarding judicial abilities to deal with fiscal issues – carries the potential to highlight the ambiguities and inconsistencies in the judgments and in the arguments that underlie them.

But before doing so, some preliminaries must be addressed. First, as always: terminology. But in this case, terminology is also substantive. Scholars writing on the theoretical and pragmatic objections to judicial enforcement of rights to education, health, housing and the like, tend to use the term ‘social and economic rights’.² This chapter, however, will follow the lead suggested by Mark Tushnet and use the term ‘social welfare rights’.³ As Herman Schwartz and others have recently noted, ‘the central issue is not really about social and economic rights, but primarily about social rights. More precisely, it is

* I would like to thank Mark Tushnet, Aeyal Gross, Neta Ziv and other participants in the conference for thoughtful and helpful comments. Unless otherwise stated, all translations are mine.

¹ J Waldron, ‘Introduction’ in J Waldron (ed), *Theories of Rights* (Oxford, Oxford University Press, 1984) 1, 11.

² There are good reasons for doing so. After all, international documents bind social and economic rights together. See, eg International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; UN Commission on Human Rights, Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights (‘Limburg Principles’) (8 January 1987) UN Doc E/CN.4/1987/17; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (22–26 January 1997).

³ M Tushnet, ‘Social Welfare Rights and the Forms of Judicial Review’ (2004) 82 *Texas Law Review* 1895, 1895.

about social and certain economic rights'.⁴ The reason for excluding paradigmatic economic rights such as property and contract from this discussion lies not only in the fact that there is little controversy over the legitimacy of their judicial enforcement, but also because judicial deference to economic rights such as property and contract conflicts with the redistributive interests that lie at the heart of social welfare rights.⁵

The second preliminary note comes in the form of a qualification: the chapter does not seek to confront the issue that has occupied many American constitutional scholars, to wit: whether social and economic rights belong in a constitution.⁶ The normative focus of this chapter, with its affinities to legal realism, agrees that 'there is no reason to think that it is the constitutionalization of these rights that is crucial'.⁷ Courts may have profound impact on social policies without resorting to judicial review of legislation. First, because a significant amount of policy decisions, on the micro and macro level, are made at the sub-legislative, administrative, level.⁸ Second, even where legislation is involved, courts can enforce rights through other methods, such as the interpretation of statutes.⁹

Turning to the substantive focus of the chapter, it is necessary to ask: what is the advantage of analyzing the judicial enforcement of social and economic rights through the perspective of money? The fact that the perspective has largely been swept away as 'an offense to polite manners'¹⁰ is a good enough reason to finally do so. But it is far more than that. One may say that the same, well-worn theoretical objections to SW rights that were, as noted, effectively answered, are being redressed in fiscal clothes. Three such objections are noted: first, that the judicial enforcement of SW rights endangers proper separation of powers; second, that the courts lack the expertise and competence to deal with the complex issues that SW rights raise; and third, that vexing enforcement problems related to SW rights will reflect poorly on rights in general, and will endanger respect for first generation, civil and political (CP) rights. Now, while these objections were formulated, at first, in a straightforward fashion, today they almost always seek reinforcement from one or more of the usual concepts: budget, funding, resources, and the like. But, of course, the substantive rebuttal to the objections still remains, and should be articulated.

⁴ H Schwartz, 'Do Economic and Social Rights Belong in a Constitution?' (1995) 10 *American University Journal of International Law and Policy* 1233, 1235; also D Barak-Erez and A Gross, 'Social Rights and the Struggle for Social Citizenship' in S Almog and Y Rotem (eds), *Dorner Book* (Srigim, Nevo, 2009) 189, 190.

⁵ M Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, Princeton University Press, 2008) 170–94. For the impact of social welfare rights on redistribution, see D Barak-Erez and A Gross, 'Introduction: Do We Need Social Rights – Questions in the Era of Globalization, Privatization and the Diminished Welfare State' in D Barak-Erez and A Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Oxford, Hart Publishing, 2007) 1, 16.

⁶ F Michelman, 'The Constitution, Social Rights and Liberal Political Justification' in Barak-Erez and Gross, *Exploring Social Rights* (n 5) 21; C Fabre, *Social Rights Under the Constitution* (Oxford, Oxford University Press, 2000); H Schwartz, 'Economic and Social Rights' (1993) 8 *American University Journal of International Law and Policy* 551.

⁷ Schwartz, 'Economic and Social Rights' (n 4) 1243.

⁸ R Titmuss, 'Welfare "Rights", Law and Discretion' (1971) 42 *The Political Quarterly* 113, 120–21, 124 ('public assistance in the United States is almost entirely discretionary'); M Diller, 'The Revolution in Welfare Administration: Rules, Discretion and Entrepreneurial Government' (2000) 75 *New York University Law Review* 1121, 1147; J Handler, 'Discretion in Social Welfare: The Uneasy Position in the Rule of Law' (1983) 92 *Yale Law Journal* 1270, 1276; D Barak-Erez, 'The Israeli Welfare State – Between Legislation and Bureaucracy' (2002) 9 *Labor, Society and Law* 175, 177–78 (in Hebrew).

⁹ Tushnet, 'Social Welfare Rights' (n 3) 1898; Tushnet, *Weak Courts, Strong Rights* (n 5) 224.

¹⁰ S Holmes and C Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York, WW Norton, 1999) 24.

In what follows, I will briefly outline the three arguments, show each one's modern association with budgetary concerns, and note some instances that reveal how this association was expressed in Israeli case law. Part II will discuss the argument concerning separation of powers; part III will focus on the argument concerning the courts' competency to deal with SW rights; and part IV will discuss the objection to SW that is concerned with lack of applicability and the impact that 'futile' efforts to implement SW rights supposedly has on 'real' (ie CP) rights. I then turn, in part V, to a focused rebuttal of the fiscal objection. The chapter concludes, in part VI, with a suggestion as to why this particular objection has remained so attractive to courts and to scholars alike. I believe that the latter analysis suggests a theoretical reconstruction that has implications not only to the subject at hand, but also to the way SW rights, and rights in general, are reconstructed in contemporary judicial discourse.

II. SEPARATION OF POWERS

According to this argument, the judiciary should refrain from enforcing SW rights because acting otherwise would require the courts to adjudicate policies, priorities and, ultimately – to distribute and redistribute funds. Such a result is tantamount to the unconstitutional, illegitimate and undemocratic transfer of authority from Parliament and government to the courts.¹¹ Timothy Macklem's exposition of the argument reveals its strong ties to matters of resources and funding. He argues that allowing the courts power to enforce social welfare rights would grant them the role to decide

the level of funding that health care should receive from the government, and . . . how that funding should be distributed . . . It would be for the courts to set the direction for the economy, to establish the curriculum for the schools, to determine environmental policy – in short, to govern. Clearly this would be undesirable, for it would have the effect of transferring virtually all democratic authority from the people's present representatives . . . to the courts whose duty it is to interpret and enforce that Constitution.¹²

Frank Cross drives the point home, employing the timeless phrase and stating that 'courts understand that requiring legislatures to provide minimal levels of subsistence for all Americans encroaches upon the jealously guarded "power of the purse"'.¹³ This, indeed, fits well with the US Supreme Court's self-awareness, remarking as it did that 'the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court'.¹⁴

Across the ocean, the House of Lords has been characterised as holding 'a deeply embedded judicial conviction that matters of public finance are the preserve of the elected branches of government and not of courts'.¹⁵ And the Irish Supreme Court concluded that 'it is not the function of the courts to make an assessment of the validity of the many competing claims on national resources'.¹⁶

¹¹ See the discussion in G Davidov, 'Constitutional Review of Budgetary Matters' (2007) 49 *The Lawyer* 345, 348–49 (in Hebrew).

¹² T Macklem, 'Vriend v Alberta: Making the Private Public' (1999) 44 *McGill Law Journal* 197, 210.

¹³ F Cross, 'The Error of Positive Rights' (2001) 48 *UCLA Law Review* 857, 890.

¹⁴ *Dandridge v Williams* 397 US 471, 487 (1970); *Mathews v Eldridge* 424 US 319, 348 (1976).

¹⁵ ED Palmer, 'Resource Allocation, Welfare Rights' (2000) 20 *OJLS* 63, 74.

¹⁶ *TD v Minister for Education* [2001] 4 IR 259 (Ir).

And yet, on a normative level, it is simply not true that the courts *can* refrain from intervening in questions of distribution and redistribution. Not intervening, in such cases, would usually mean embracing the highly controversial baseline of the market, or even accepting the economic status quo that, in itself, depends on public institutions and state action.¹⁷ The decision not to alter the ‘background rules’ that inform the current social and economic state of affairs is a decision in its own right. Even the distinction between ‘commission’ and ‘omission’ is not relevant in this case. For, in constitutional democracies, courts quite often protected rights to property and contract, at the expense of other social and legal interests (the *Lochner* era being an obvious example).¹⁸ In Professor Tushnet’s words: ‘The state is complicit in creating the distribution of wealth in society whether it “acts” affirmatively or whether it does nothing but enforce the background rules of property and contract law’.¹⁹

However, as shown by the example of Israeli health policy, the courts tend to accept the bond between fiscal considerations and the threat to separation of powers. Some background is warranted: the National Health Insurance Law, 5754-1994, establishes a basket of health services to which citizens are entitled, and the process for updating the basket. The Law grants the Ministers of Health and Finance the power to update the basket, following a recommendation by the Health Council.²⁰ In *Maccabi Health Services v Minister of Finance*,²¹ the health fund challenged the Minister’s refusal to update the health index, despite a unanimous recommendation to that effect by the Health Council, which was buttressed by a similar assertion by a parliamentary committee of enquiry. The Minister recognised the objective need to update the health index, but replied that budgetary constraints restrained him from acting accordingly.

The Israeli Supreme Court (ISC) dismissed this argument, mocking it as an attempt to devise a new theory of *ubi remedium ibi jus* – where there is a remedy there is a right²² – instead of the other way around. The Court clarifies that where a statutory obligation is recognised, the state cannot argue that fiscal resources prevent it from living up to its duties. The Court also noted that ignoring the Health Council’s opinion, undermines the Council’s statutory standing as an expert advisor in the process.²³ However, after all this

¹⁷ A Sen, *Inequality Reexamined* (Oxford, Clarendon Press, 1992) 1–100; Holmes and Sunstein (n 10) 61.

¹⁸ *Lochner v New York* 198 US 45, 45 (1905) (striking down a New York law that limited the work day to 10 hours, and the work week to 60 hours, for being an ‘unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract’); *Adkins v Children’s Hospital* 261 US 525 (1923) (striking down a law providing minimum wages for women and children); *Adair v United States* 208 US 161 (1908) (upholding ‘yellow dog’ contracts that forbid workers from joining unions); *Tyson & Brother v Banton* 273 US 418 (1927) (striking down a law regulating the price of theatre tickets); *Weaver v Palmer Bro Co* 270 US 402 (1926) (striking down a public health and safety regulation concerning the use of fabrics as a violation of the due process clause). See C Sunstein, ‘Lochner’s Legacy’ (1987) 87 *Columbia Law Review* 873, 883 (arguing that the ‘central problem of the *Lochner* Court had to do with its conceptions of neutrality and inaction and its choice of appropriate baseline’).

¹⁹ Tushnet, *Weak Courts, Strong Rights* (n 5) 189; for Tushnet’s own discussion of the *Lochner* era see ibid 172–74.

²⁰ The Health Council is chaired by the Minister of Health, and consists of 46 members from government ministries, health funds, Israel Medical Association, academia, trade unions, employers and municipalities – National Health Insurance Law, 5754-1994, s 49.

²¹ HCJ 2344/98 *Maccabi Healthcare Services v Minister of Finance* 54(5) PD 729 [2000] (in Hebrew).

²² See also Holmes and Sunstein (n 10) 43 (explaining that individuals enjoy rights in a legal, as opposed to a moral, sense, ‘only if the wrongs they suffer are fairly and predictably redressed by their government’).

²³ *Maccabi* (n 21) 761–62.

'lofty talk',²⁴ the Court concluded that it *cannot* order the Government to spend the sums that would result from accepting the petition: 'We have never instructed the state to pay anyone out of its budget amounts of such magnitude as those that the health funds are asking for in the present matter'.²⁵

III. COMPETENCE

Critiques of judicial enforcement of SW rights suggest that the courts, which hear cases on an individual basis, are not equipped to deal with issues that require a broader view. Moreover, the complex nature of social and economic issues bars the courts from truly assessing the whole environment from which the case stems and which is affected by the decision.²⁶

Continuing the analysis of the judicial role with respect to Israeli health policy, Chinitz and Shalev note that 'It is not surprising that the Court is hesitant to intervene in such technical and obscure fiscal matters . . . The Court is not necessarily well equipped to deal with accounting'.²⁷ Moreover, even appeals to courts to overturn health fund decisions are 'unlikely to succeed, unless the letter of the law has been ignored. The courts acknowledge budgetary constraints and accept standards of evidence-based medicine as benchmarks for public funding'.²⁸

However, as the *Maccabi* case, described above, suggests, it is often the *political* decision that is not based on 'evidence-based medicine', while the judicial one may rely on substantial expert opinion (such as that of the Health Council, in that case). Even then, extreme judicial restraint is observed.

Though courts should not be dismissive of the fact that the individual case they are addressing may have repercussions for others whose claim is not heard, it should also be recalled that courts deal, on a daily basis, with intricate economic problems that have serious ramifications in trade, business, monopolies, taxes, and similar realms. This is done, of course, with no qualms regarding competence.²⁹ Moreover, an institutional analysis of legislatures and courts reveals no important differences regarding the pressures to which they are subject, the considerations they take into account and the level of generality they aim for.³⁰ An analysis of post-Communist socio-legal developments suggests that even where constitutional courts intervened in a manner that moderated the transition to market economies, no 'disaster' has come to pass, despite warnings to that effect.³¹ Moreover, in some cases (such as Hungary) the transition may have been improved by the Constitutional Court's oversight and regulation. The charge that the

²⁴ *ibid* 750–51; see also D Chinitz and C Shalev, 'Joe Public v The General Public: The Role of the Courts in Israeli Health Care Policy' (2005) 33 *Journal of Law, Medicine & Ethics* 650, 654.

²⁵ *Maccabi* (n 21) 752.

²⁶ See Holmes and Sunstein (n 10) 18–19.

²⁷ Chinitz and Shalev (n 24) 653.

²⁸ *ibid* 655.

²⁹ F Michelman, 'In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice' (1973) 121 *Pennsylvania Law Review* 962, 1006.

³⁰ J Deutsch, 'Neutrality, Legitimacy and the Supreme Court: Some Intersections between Law and Political Science' (1968) 20 *Stanford Law Review* 169, 183–84.

³¹ KL Scheppele, 'A Realpolitik Defense of Social Rights' (2004) 82 *Texas Law Review* 1921, 1948; Tushnet, *Weak Courts, Strong Rights* (n 5) 235–36.

court lacks expertise to deal with social and economic issues, therefore, seems to rely on shaky evidence. The conclusion should be that even where budgetary issues are concerned, the court's particular expertise justifies expanding 'the normal conception of the role of the courts in a democratic society to include the role of "policy partner" in ongoing bargaining about how a state should use its scarce resources'.³²

A more nuanced rebuttal to this objection stems from the fact that not all reviews of social policies are alike. An important distinction should be made at the level of remedy, between demands that the court itself erects a policy or programme, on the one hand, and charges to administer the policy in a fair and equal fashion, on the other hand.³³ An example of the latter case is the Canadian Government's refusal to provide sign language interpreters to deaf patients on the basis that it would put a 'severe strain on the fiscal sustainability of the health care system'.³⁴ The Court reasoned that 'The Legislature, upon defining its objective as guaranteeing access to a range of medical services, cannot evade its obligations . . . to provide those services without discrimination by appointing hospitals to carry out that objective'.³⁵ The Court may well be hesitant to dictate the erection of a particular medical service, but once the Government decided to enter the field, 'it must provide *all* the services within the genre'³⁶ to all the relevant recipients. We find, once again, that the ability to link such SW challenges to the duty to treat all citizens with equal concern and respect increases their appeal.³⁷

And yet, while this approach seems quite appealing, it also raises a particular difficulty: the fact that court decisions that give effect to SW rights are deemed justifiable only when a given policy is in effect suggests that it is the principle of non-discrimination, rather than social and economic rights, that is doing 'the work'. The result is twofold: first, as a principled matter, rather than undermining the 'liberal' (in the European sense) tendencies of the courts, this approach reveals a willingness to entertain SW challenges only when they can be broken down to an individual's (preferably – nameable individual's) interests, but not when they are presented as collective harms, however ill-conceived, unprofessional and harmful to constitutional rights. Secondly, the concrete effects of the approach are noticeable, insofar as the remedy is concerned: instead of a generalised (or even generalizable) injunction, the court will solve a particular problem for a particular individual. In doing so, it will also praise the importance of SW rights, and mock the irrelevance of budgetary concerns, which will be relatively minimal in the case at hand. We find, then, that this approach does not only trace the limits of the ability to challenge social and economic policies in a successful manner (ie when discrimination is established). It also reinforces, rather than undermines, the traditional objection to the court's ability to reach decisions that have complex, and perhaps unpredictable, consequences, an objection that is especially visible where SW rights are concerned.

A few Israeli cases from the field of education seem particularly relevant: in *Botzer*, the ISC ruled that a school must make the necessary physical arrangements to grant a

³² Scheppele (n 31) 1935.

³³ Davidov (n 11) 351.

³⁴ *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624 (Can).

³⁵ *ibid* para 51; see Tushnet, *Weak Courts, Strong Rights* (n 5) 205 (asserting that, under *Eldridge*, once a government decides to provide some social welfare services, it must do so without discrimination).

³⁶ *ibid* (n 5) 205.

³⁷ See, eg D Barak-Erez and A Gross, 'Social Citizenship: The Neglected Aspect of Israeli Constitutional Law' in Barak-Erez and Gross, *Exploring Social Rights* (n 5) 243, 252–53; F Michelman, 'Foreword: On Protecting the Poor through the Fourteenth Amendment' (1969) 83 *Harvard Law Review* 7, 11.

child who suffers from multiple sclerosis and is bound to a wheelchair, easy access to and from his classroom.³⁸ The Court did not miss the opportunity to assert that ‘ensuring equal opportunity . . . costs money’ and that the constitutional right to dignity includes the right to equal opportunities in education.³⁹ Needless to say, the judgment did not require *all* schools in Israel to make similar modifications to allow children with disabilities to be integrated in the general school system. Indeed, the very same year the ISC rejected a petition that challenged a ministerial (and not statutory) budgetary decision to cut a programme that assists the children suffering from environmental disadvantage and helps them integrate, socially and intellectually, into the general school system.⁴⁰ The Court distinguished its decision from *Botzer*, stating that ‘the principle of equal opportunity does not stand alone. It cannot be severed from the *general social context*. The realization of the principle requires resource allocation. The financial ability of the government authority should be balanced against the needs’.⁴¹

A similar fate was in store for a petition to force the Ministry to apply provisions of the Special Education Law 5748-1988 that require the integration of children with special needs in the general education system to children aged three to four.⁴² In a brief judgment, the Court acknowledged that the professional consensus is that the integration of children with disabilities enhances their social and intellectual ability, and that time is of critical importance.⁴³ But it rejected the charge, stating that the limited budgetary abilities require prioritization, and that is left to the Government.⁴⁴ Such budgetary considerations were left irrelevant when the ISC considered a demand that a municipality shoulder the costs of transferring a child who suffered severe social problems in her original school.⁴⁵ The ISC relied on the constitutional right to education that should be supplied free of charge, including in cases where particular solutions are necessary.

A pattern emerges: when a general social problem is laid down for the court, budgetary concerns are raised. When a very similar social issue (eg integration of children into schools) is broken down – the court is much more receptive. As Tushnet’s summary of Irish cases reveals, the same pattern is observed in other countries.⁴⁶

IV. APPLICABILITY AND SPILLOVER EFFECTS

This argument suggests that, because of their budgetary implications, SW rights simply cannot be enforced. It would seem surprising to find a court stating such a rationale explicitly and, indeed, no such sentiment appears in ISC (or other court’s) judgments that I am aware of. However, the centrality of this argument as a wedge to distinguish

³⁸ HCJ 7081/93 *Botzer v Municipal Council of Maccabim-Reut* 50(1) PD 19 [1996] (in Hebrew).

³⁹ *ibid* para 27.

⁴⁰ HCJ 1554/95 *Shoharei Gilat Society v Minister of Education* 50(3) PD 2 [1996] (in Hebrew).

⁴¹ *ibid* para 41.

⁴² HCJ 5597/07 *Alut – The National Association for Children with Autism v Minister of Education* (21 August 2007), Nevo Legal Database (by subscription) (in Hebrew).

⁴³ *ibid* para 4.

⁴⁴ *ibid* para 6.

⁴⁵ HCJ 7374/01 *John Does v Director of the Ministry of Education* (10 September 2003), Nevo Legal Database (by subscription) (in Hebrew).

⁴⁶ Tushnet, ‘Social Welfare Rights’ (n 3) 1899–1900.

CP from SW rights in academic writings,⁴⁷ and its strong relation to budgetary concerns, merits some discussion here.

Frank Cross explains that courts 'avoid involving themselves in matters fundamental to the enforcement of positive rights'.⁴⁸ The argument is very similar to that of Maurice Cranston's, almost 50 years ago.⁴⁹ Though they do not state the argument explicitly in these terms, it can be understood from the thrust of Cranston's and Cross's argument, that the recognition of one type of right (social or economic) to which one cannot give effect may lead to a derogation of the status of rights in general and to the state's commitment to the protection of rights.

Cass Sunstein articulated this concern, stating that

[i]f positive rights are not enforceable, the constitution itself may seem like a mere piece of paper; there could be adverse consequences for other rights as well . . . the existence of unenforceable rights will in turn tend to destroy the negative rights – freedom of speech, freedom of religion, and so forth – that might otherwise be genuine ones. If some rights are shown to be unenforceable, it is likely that other rights will be unenforceable as well.⁵⁰

But this worry seems to rest on the fallacious assumption that if a right is recognised, it should *always* trump other interests. However, there is no reason to assume that advocates of the right assume that it is an absolute one, or that the state is under a duty to invest all its resources in one right or another. As Joseph Raz notes, the tendency to portray support for certain rights as espousing a position in favour of absolute rights amounts to a 'simple mistake' which is more common than what would be expected:

The fact that a given right can be overridden by moral considerations, just like the fact that it can be overridden by another legal right, shows nothing except that it is not an absolute right which defeats all contrary considerations.⁵¹

Of course, if a full realization of the right to health and education would require that everyone be able to enjoy free comprehensive health services on demand and free education to her heart's content, it may well be that no country will ever have the financial capabilities necessary to hold up to such a standard. This does not imply, however, that within the domestic legal system these rights carry no weight, and surely does not demand the conclusion that they are not rights at all. Despite attempts to dismiss rights that correspond to 'imperfect obligations' (used here to refer to obligations that cannot be addressed in full),⁵² the feasibility of enforcement of rights is not a criterion (or at least not an overwhelming criterion) when dealing with the question of recognition of rights. Since rights cost money, the decision to realise civil and political rights by policing political demonstrations that people find offensive, for example, may divert funds

⁴⁷ See, eg Y Dotan, 'The Supreme Court as Defender of Social Rights' in Y Rabin and Y Shani (eds), *Economic, Social and Cultural Rights in Israel* (Tel-Aviv, Ramot, 2004) 69, 88–97.

⁴⁸ Cross, 'The Error of Positive Rights' (2001) (n 13) 889, 904–05.

⁴⁹ M Cranston, 'Human Rights, Real and Supposed' in DD Raphael (ed), *Political Theory and the Rights of Man* (Indiana, Indiana University Press, 1967) 50.

⁵⁰ C Sunstein, 'Against Positive Rights' in A Sajo (ed), *Western Rights, Postcommunist Application* (Hague, Kluwer Law International, 1996) 225, 229. For a similar argument, see LW Sumner, *The Moral Foundations of Rights* (Oxford, Clarendon Press, 1989) 15; R Epstein, 'Classical Liberalism Meets the New Constitutional Order: A Comment on Mark Tushnet' (2002) 3 *Chicago Journal of International Law* 455, 464.

⁵¹ J Raz, 'Legal Rights' (1984) 4 *OJLS* 1, 19; Holmes and Sunstein also acknowledge this truism (n 10) 97.

⁵² R Epstein, 'The Uncertain Quest for Welfare Rights' (1985) *Brigham Young University Law Review* 201, 204.

away from building hospitals. Such a decision, in other words, is a political and not a conceptual one.⁵³

V. THE FISCAL OBJECTION REVEALED AND DISCUSSED

In the discussion above, I briefly addressed each of the objections noted above in their new, 'fiscal', dressing. However, as noted, all these arguments collapse, in their contemporary versions, into objections that have money at the centre of their interest.⁵⁴

Further evidence that the arguments discussed are strongly linked to fiscal constraints in contemporary discourse is revealed in the negative. In the (justifiably) celebrated South African *Treatment Action Campaign* (TAC) case,⁵⁵ the Constitutional Court ordered the Government to distribute a drug, Nevirapine, that reduces the transmission of HIV/AIDS from pregnant mothers to children. The interesting point, for present purposes, is that the drug's manufacturer was willing to supply as much as was needed at no cost.

TAC presented a complex case that required proper professional and bureaucratic expertise, where it could be expected that bona fide questions of competence could be raised. This matter was indeed acknowledged by the South African Constitutional Court.⁵⁶ And yet, instead of deferring to the Government's discretion, the Constitutional Court addressed and dismissed the relevant arguments (efficacy, safety, biomedical resistance, cultural reservations to bottle feeding, absence of clean water) one by one.⁵⁷ Similarly, the Constitutional Court rejected the Government's position that it is not in a position to distribute the drug across the country as 'not relevant to the question' at hand.⁵⁸ The reason for such an outright rejection of the Government's arguments in such a complex case seems clear. Where the fiscal impact of compliance is small, the normative objections seem to wither away.⁵⁹ What made the decision 'a relatively easy one for the Court', argues Denis Davis, was the lack of 'any sustainable argument concerning distributional questions'.⁶⁰ Indeed, when the ISC discussed a parallel case, the ISC distinguished the matter from TAC by noting (and emphasizing) that, in the latter case, 'the drug was distributed *free of charge*'.⁶¹

It makes sense, therefore, to focus on the argument that the fact that enforcement of SW rights requires public funds is, in and of itself, sufficient to bar them from judicial enforcement.

The surprisingly trivial refutation of this argument is that while SW rights do indeed require funds, they are not unique in doing so.⁶² However, where CP rights (including

⁵³ R Dworkin, *Sovereign Virtue* (London, Harvard University Press, 2000) 137.

⁵⁴ J Kuthari, 'Social Rights Litigation in India' in Barak-Erez and Gross, *Exploring Social Rights* (n 5) 171, 174.

⁵⁵ *Minister of Health v Treatment Action Campaign* 2002 (10) BCLR 1075 (CC) (S Afr).

⁵⁶ *ibid* para 38.

⁵⁷ *ibid* paras 56–64.

⁵⁸ *ibid* paras 65–66.

⁵⁹ See also, Tushnet, *Weak Courts, Strong Rights* (n 5) 247.

⁶⁰ D Davis, 'Socio-Economic Rights: The Promise and Limitations: The South African Experience' in Barak-Erez and Gross, *Exploring Social Rights* (n 5) 193, 199.

⁶¹ HCJ 3071/05 *Louzon v Government of Israel* (28 July 2008), Nevo Legal Database (by subscription) para 12 (in Hebrew).

⁶² See, eg Michelman, 'The Constitution' (n 6) 24; Davidov (n 11) 354–55.

equality) are concerned, the courts are quite impatient with such arguments. Thus, the Canadian Supreme Court accepted a claim that a benefit policy was discriminatory, and was undeterred by the fiscal implications, noting that ‘any remedy granted by a court will have some budgetary repercussions whether it be a saving of money or an expenditure of money’.⁶³ And in *Singh*,⁶⁴ the same Court rejected the Government’s position that refugees can be denied an oral hearing because of the unreasonable budgetary burden that granting such a right would entail.⁶⁵ Similarly, the South African Constitutional Court ruled that prisoners may not be denied the right to vote, even though granting them such rights may have serious logistic and financial implications.⁶⁶

In Israel, the Supreme Court stated that it is ‘natural’ that implementing equality (in this case – to women in the air force) would have financial consequences.⁶⁷ In fact, where equality is concerned, the ISC repeated the simple statement that ‘human rights cost money’ on several occasions: when accepting the charge that forcing airline cabin attendants to retire at 60 constitutes age discrimination;⁶⁸ when accepting the claim that different early retirement arrangements for men and women cannot be justified by budgetary concerns;⁶⁹ when stating that such concerns cannot justify discrimination between groups entitled to benefits and subsidies;⁷⁰ when ordering a deeper drill for a pipe line to avoid harming graves, at the cost of 500,000 NIS (New Israeli Shekel);⁷¹ and when striking down a law that permits holding accused soldiers for extensive periods before seeing a judge.⁷²

As trivial as this seems, a testament to the power of the original argument discussed in this part is the fact that two prominent constitutional scholars, Stephen Holmes and Cass Sunstein, dedicated a book to refuting it. The main argument in *The Cost of Rights*⁷³ is clearly stated in the introduction:

To the obvious truth that rights depend on government must be added a logical corollary, one rich with implications: rights cost money . . . The right to freedom of contract has public costs no less than the right to health care, the right to freedom of speech no less than the right to decent housing. All rights make claims upon the public treasury.⁷⁴

Contemporary antagonists of SW rights have understood the force of this reply, and have revised their position, arguing that the distinction between SW rights and tradi-

⁶³ *Schachter v Canada* [1992] 2 SCR 679, 709 (Can).

⁶⁴ *Singh v Minister of Employment and Immigration* [1985] 1 SCR 177 (Can).

⁶⁵ *ibid* para 70.

⁶⁶ *Minister of Home Affairs v NICRO* 2004 (5) BCLR 445 (CC) para 48 (S Afr) (‘Resources cannot be ignored in assessing whether reasonable arrangements have been made for enabling citizens to vote. There is a difference, however, between a decision by Parliament or the Commission as to what is reasonable in that regard and legislation that effectively disenfranchises a category of citizens’).

⁶⁷ HCJ 4541/94 *Miller v Minister of Defence* 49(4) PD 94, 142 [1995] (in Hebrew).

⁶⁸ HCJFH 4191/97 *Recanat v National Labour Court* 54(5) PD 330, 366 [2000] (in Hebrew).

⁶⁹ HCJ 6845/00 *Niv v National Labour Court* 56(6) PD 663, 697 [2002] (in Hebrew) (‘we find it difficult to understand how budgetary considerations could justify discrimination of women’).

⁷⁰ HCJ 5496/97 *Mardi v Minister of Agriculture* 55(4) PD 540, 568 [2001] (in Hebrew) (even when the budget for the relevant needs has been spent in its entirety, ‘remedying discrimination . . . might cost money . . . [and there is] an obligation to find the way to pay the necessary sums’).

⁷¹ HCJ 4638/07 *Al-Akta Almobarak Company Ltd v Israel Electric Co* (29 October 2007), Nevo Legal Database (by subscription) para 11 (in Hebrew).

⁷² HCJ 6055/95 *Zemach v Minister of Defence* 53(5) PD 241, 281 [1997] (in Hebrew) (‘defending human rights often has costs’).

⁷³ Holmes and Sunstein (n 10).

⁷⁴ *ibid* 15.

tional, CP rights, is one of quantity, not quality. In other words, it is indeed true that both 'types' cost money, but the degree of SW expenditure is of such a different magnitude that it demands a conceptually different treatment.⁷⁵ This position, positively noted by the ISC,⁷⁶ suggests that, because SW rights require *massive* distributions of funds, they raise questions of competence and democratic legitimacy in a way that minor expenditures that result from decisions concerning CP rights do not. There are two different responses to this renewed version of the traditional argument. The *first* relates to the above discussion, concerning the importance of the remedy sought when assessing the legal challenge.⁷⁷ The reason that the remedy comes to the fore is that, since almost all modern nations have in place governmental health care, education, subsistence support and similar programmes, demands that the court institute a new social programme 'from scratch' are extremely rare.⁷⁸ Much more common – *and potentially costly* – are demands that existing social policies should not discriminate against defined groups (women, single parents, single sex couples, immigrants, etc). And yet, even those advancing the objection under review do not suggest that the courts should refrain from scrutinizing claims of discrimination, even against the background of SW policy.⁷⁹

A *second* response to this objection takes it at face value: even if there *is* a clear way of distinguishing CP claims from SW claims (as was made clear, at least equality blurs the line), the argument relies on empirical evidence that is not offered. In fact, there may well be evidence to the contrary. *The Costs of Rights*, in fact, includes an appendix entitled 'Some Numbers on Rights and Their Costs',⁸⁰ exemplifying the astounding cost of CP rights enforcement in the US. For example, the Federal prison system costs \$2.465 billion; the Federal court system costs almost \$1.5 billion; the joint cost of animal and plan inspection and food and safety inspection is close to \$1 billion; Defence Department obligations exceed \$20 billion; environmental protection (clear air, hazardous waste, natural resources, and water quality) costs over \$1.3 billion; and Census Bureau activities, government publications, postal services and national archives cost over \$500 million.

In Israel, several cases can be noted to make the same point. While finding that the 'Gaza Disengagement plan' is constitutional, the ISC struck down four compensation mechanisms to (former) settlers in the region.⁸¹ A senior Ministry of Finance official estimated the cost of the judgment at 500 million NIS, raising the total cost to 7.5 billion NIS,⁸² while a subsequent report issued by the Knesset (Israeli Parliament) Research and Information Center assessed the cost of the judgment at 10.8 billion NIS (about \$3 billion).⁸³ Following the Disengagement, the ISC did not hesitate ordering the Government to

⁷⁵ Tushnet, 'Social Welfare Rights' (n 4) 1896; M Cohen-Eliya, 'The Blues, the Reds, and the Judge in Between: A Procedural Approach with Bites for Judicial Review on Social Rights' (2009) 12 *Law and Government* 407, 410–15, 420–21 (in Hebrew).

⁷⁶ *Louzon* (n 61) para 10.

⁷⁷ Text to nn 33–37.

⁷⁸ Schwartz, 'Economic and Social Rights' (n 4) 1238.

⁷⁹ Cohen-Eliya (n 75) 429.

⁸⁰ Holmes and Sunstein (n 10) 233–36.

⁸¹ HCJ 1661/05 *Hof Aza Regional Council v Knesset* 59(2) PD 481 [2005] (in Hebrew).

⁸² Z Klein, 'Haber: The HCJ Judgment will increase the cost of the Disengagement Plan by 500 million NIS', *Globes*, Rishon-Lezion, 16 June 2005 (in Hebrew) www.globes.co.il/news/article.aspx?did=924114.

⁸³ I Biton, 'The Disengagement Plan from the Gaza Strip and Areas in Northern Samaria' *Knesset Research and Information Center* (31 January 2010) (in Hebrew), available at: www.knesset.gov.il/mmm/data/pdf/m02539.pdf.

complete the necessary defence for classrooms in the Gaza vicinity, despite warnings that the costs would reach ‘hundreds of millions of NIS in the short run, and probably several billion NIS in the long run’.⁸⁴ The overall cost of the ISC’s orders to dismantle (and re-erect) certain segments of the separation barrier⁸⁵ is estimated at 1.5 billion NIS (\$416 million).⁸⁶ The ISC’s unprecedented decision to strike down a law that would authorise the establishment of a private prison⁸⁷ has been estimated to cost the tax payer up to 637 million NIS (\$177 million).⁸⁸

Another case merits particular mention, as it combines exceptional, clear financial consequences with the Court’s refusal to give them any consideration. In addition, the case manifests the Court’s complete disregard of the Government’s legitimate priorities and rationales. In the case, *Dan Area Revenue Service v Perry*,⁸⁹ the ISC denied an appeal on the Tel-Aviv District Court’s decision, according to which child care should be recognised as exemptions for tax purposes. The decision was made despite the Ministry of Finance’s assertion that it would cost the public treasury over 3 billion NIS (\$900 million) *per year*.⁹⁰ Where the tax interests of successful lawyers are concerned, it would seem, fiscal concerns lose their appeal.

When SW claims appear before the Court, particularly in their ‘naked’ form which highlights the fiscal aspect, the Court’s worst fears are met with an unmitigated reply. In *Manor*⁹¹ and in *Commitment to Peace*⁹² claims were made that social benefit cuts (to old age pensions and to subsistence benefits, respectively) infringe an impoverished individual’s ability to a life of dignity and undermine the right to social security.⁹³ In light of the above, the fact that the Court ruled against the claimants is not surprising.

The surprise, or disappointment, stems from ISC’s logic, which is a testament to its complete deference to government fiscal policy. The Israeli constitutional method that has developed over the past two decades involves a three-stage analysis.⁹⁴ First, the court assesses whether a constitutional right has been violated. If so, it continues to assess whether the infringement is by law, proportionate to the benefit, and cannot be achieved by less harmful means. The third stage involves a discussion of the constitutional remedy, if necessary.

In the vast majority of cases, the court is very lenient insofar as the first stage is concerned, and focuses its attention on the second stage. The court, in other words, is ready to recognise an infringement of constitutional right even when it is patently clear that the infringement is justified, and marginal when compared to the beneficial objective

⁸⁴ HCJ 8397/06 *Wasser v Minister of Defence* 62(2) PD 198 [2007] para 8 (in Hebrew).

⁸⁵ HCJ 2056/04 *Beit Sourik Village Council v Government of Israel* 58(5) PD 807 [2004] (in Hebrew); HCJ 7957/04 *Mara’abe v Prime Minister of Israel* 60(2) PD 477 [2005] (in Hebrew).

⁸⁶ S Arieli and M Sfar, *The Wall of Folly* (Tel-Aviv, Yedi’ot Sfarim, 2008) 225.

⁸⁷ HCJ 2605/05 *Academic Center of Law and Business v Minister of Finance* (19 November 2009), Nevo Legal Database (by subscription) (in Hebrew).

⁸⁸ B Arad, *The Cost of Judicial Activism* (Jerusalem, Jerusalem Center for Market Research, 2010).

⁸⁹ CA 4243/08 *Dan Area Revenue Service v Perry* (30 April 2009), Nevo Legal Database (by subscription) (in Hebrew).

⁹⁰ H Kanna, ‘Tax claims worth billions are swamping the courts’, *Calcalist*, Tel-Aviv, 29 June 2009 (in Hebrew) www.calcalist.co.il/local/articles/0,7340,L-3275640,00.html. The judgment was overturned by statute.

⁹¹ HCJ 5578/02 *Manor v Minister of Finance* 59(1) PD 729 [2004] (in Hebrew).

⁹² HCJ 366/03 *Commitment to Peace and Social Justice Association v Minister of Finance* 60(3) PD 464 [2005] (in Hebrew).

⁹³ See Barak-Erez and Gross, ‘Social Citizenship’ (n 37) 250–52.

⁹⁴ CA 6821/93 *United Mizrahi Bank Ltd v Migdal Cooperative Village* 49(4) PD 221, 428 [1995] (in Hebrew).

that the law in question achieves.⁹⁵ The sizable majority of petitions are denied, therefore, only after the proportionality of the violation is assessed, along with a cost-benefit analysis and an enquiry to see if the objective can be achieved at a lesser harm to the right.

The ISC's analysis in *Manor* and *Commitment to Peace* was quite different. Despite the significant cut in benefits (in some cases – up to 30 per cent), the Court was unwilling to rule that the laws in question infringed the constitutionally recognised (at least in rhetoric) right to social security *at all*.⁹⁶ We find, then, that while the Court expands its understanding of the scope of CP rights and, consequently, the occasions where a violation is exhibited, its construction of SW rights is much more narrow, and its willingness to acknowledge a violation – much more limited.

A very similar path was taken, in a series of cases, by the European Court of Human Rights, which struck down claims for subsistence benefits at the preliminary stage. Even though the claimant lacked any independent means of support, the Court ruled that the claim is 'manifestly ill-founded' since it was not clear that there were no alternative support systems.⁹⁷ Similarly, the Canadian Supreme Court rejected a claim to equalise general assistance benefits to young adults (under 30), stating that there is no legal support to the claim that a reduced benefit (one-third) constitutes a substantive constitutional harm.⁹⁸

Finally, an issue that posits the tension rights and money in their pure form has the potential to occupy the courts time and time again in the future. The matter, which may be termed colloquially as 'chipping in', concerns the conditioning of rights on payment. Here again we find a very different judicial approach where CP and SW are assessed.

In the case of *Fordyce County*⁹⁹ the US Supreme Court ruled that the Government cannot charge the immediate users of freedom of speech, such as protesters in a public park, for the expenses for speech related activities. And in a very similar Israeli case, the ISC recognised the police's power to subject a protest license to certain conditions that are relevant to matters of public order, but ruled that 'setting a price for the implementation of a right means violating the rights of those who cannot afford it'.¹⁰⁰ But this sentiment is somewhat more attenuated when SW issues are concerned.

As emerges from Eva Brems's portrayal of several copayment cases in Europe, the courts are unwilling to allow even a preliminary judicial review of the position that substantial copayments violate the right to health and to equality.¹⁰¹ Similarly, in Israel, a woman who required surgery so as not to lose her hearing was asked to pay 70 per cent of the cost.¹⁰² Being a teacher and a single parent, she could not afford the 'bill', and

⁹⁵ HCJ 9333/03 *Kaniel v Government of Israel* (16 May 2005), Nevo Legal Database (by subscription) (in Hebrew) (any new tax infringes on the right to property); HCJ 5026/04 *Design 22 Shark Deluxe Furniture Ltd v Rosenzweig* 60(1) PD 38 [2005] (in Hebrew) (law dictating a mandatory day of rest bears on the constitutional right to freedom of occupation).

⁹⁶ *Commitment to Peace* (n 92) para 20.

⁹⁷ E Brems, 'Indirect Protection of Social Rights by the European Court of Human Rights' in Barak-Erez and Gross, *Exploring Social Rights* (n 5) 135, 155–56.

⁹⁸ *Gosselin v Quebec* [2002] 4 SCR 429 (Can); P Macklem, 'Social Rights in Canada' in Barak-Erez and Gross, *Exploring Social Rights* (n 5) 213, 237–38.

⁹⁹ *Fordyce County, Georgia v Nationalist Movement* 505 US 123 (1992).

¹⁰⁰ HCJ 2557/05 *Majority Camp v Israel Police* 62(1) PD 200 [2006] para 16 (in Hebrew).

¹⁰¹ Brems (n 97) 141.

¹⁰² HCJ 2974/06 *Israeli v Committee for the Expansion of the Health Basket* (11 June 2006), Nevo Legal Database (by subscription) para 28 (in Hebrew).

challenged the onerous copayment requirement. In rhetoric that is strikingly different from the one employed in the free speech cases, the ISC stated that when priorities are to be set, the judiciary should defer its judgment to professional committees, such as the one that deliberated the question in this case.¹⁰³

In conclusion, it would be worthwhile to refer to Ruth Gavison's suggestion that the Court's most marked deference to governmental priorities is visible in cases where 'human and social interaction'¹⁰⁴ is necessary. Contrariwise, we find that such deference is actually most notable in social policy cases where the budgetary requirements are pure and clear.

VI. HOW DID IT COME TO THIS? RIGHTS AS SOCIAL BARGAINS

The discussion to this point has shown how objections to SW rights, proven unsuccessful on their own terms, have been transformed to fiscal arguments, and have been remarkably triumphant in doing so. Moreover, as the preceding part has shown, this resurgence has taken place despite the fact that arguments focused on budgetary matters fail to distinguish convincingly between SW matters and traditional rights litigation.

I end this chapter with the suggestion that this specific transformation, and its success, is not coincidental. In fact, the fiscal redressing of the arguments against SW rights is part of a larger phenomenon, one that has deeper meanings and wider consequences. Legal discourse is in the process of restructuring rights as 'conditional'¹⁰⁵ or, in the terminology suggested by Sunstein and Holmes (importantly – in the closing sections of a book arguing against fiscal objections to SW rights) – as 'social bargains'. These are the makings of 'consumer-citizenship',¹⁰⁶ one that is 'reconceived in terms of consumption and participation in markets'.¹⁰⁷ The importance of this trend has been noted: if the welfare state was once understood to reflect 'the subordination of market price to social justice, the replacement of the free bargain by the declaration of rights',¹⁰⁸ it is now urged that 'that trajectory has been reversed'.¹⁰⁹

What are the jurisprudential consequences of the central role that market discourse has captured in policymaking? Borrowing a phrase from a different jurisprudential debate, it may be suggested that the fiscal paradigm has the potential to lead to a situation whereby 'rights become illusory' since they would 'extend only up to the point where our actions ceased to make a net contribution to the collective project'.¹¹⁰

¹⁰³ For a detailed discussion of the case and its aftermath see Barak-Erez and Gross, 'Social Citizenship' (n 37) 253–54; A Gross, 'The Right to Health in an Era of Privatization and Globalization' in Barak-Erez and Gross, *Exploring Social Rights* (n 5) 289, 323.

¹⁰⁴ R Gavison, 'On the Relationship Between Civil and Political Rights and Social and Economic Rights' in JM Coicaud, MW Doyle and AM Gardner (eds), *The Globalization of Human Rights* (United Nations University Press, 2003) 23, 37.

¹⁰⁵ A Paz-Fuchs, *Welfare to Work: Conditional Rights in Social Policy* (Oxford, Oxford University Press) 53–64.

¹⁰⁶ N Harris, 'The Welfare State, Social Security and Social Citizenship Rights' in N Harris (ed), *Social Security Law in Context* (Oxford, Oxford University Press, 2000) 3, 27.

¹⁰⁷ K Rittich, 'Social Rights and Social Policy' in Barak-Erez and Gross, *Exploring Social Rights* (n 5) 107, 111; similarly, JP Euben, 'Walzer's Obligation' (1972) 1 *Philosophy and Public Affairs* 438, 444.

¹⁰⁸ TH Marshall, 'Citizenship and Social Class' (1963) 115.

¹⁰⁹ M Katz, *The Price of Citizenship: Redefining the American Welfare State* (Pennsylvania, University of Pennsylvania, 2008) 1.

¹¹⁰ N Simmonds, 'Rights at the Cutting Edge' in M Kramer, N Simmonds and H Steiner (eds), *A Debate Over Rights: Philosophical Enquiries* (Oxford, Clarendon Press, 1998) 113, 145.

Curiously, while the above quote was meant to *criticise* a dominant theory of rights,¹¹¹ it is almost an exact translation of some ISC (and other court) pronouncements dealing with SW rights. Thus, in *Manor*, the Court stated that the objective of ‘healing the market’ is ‘important to preserve the social structure, which in turn protects human rights’.¹¹² With respect to the rights of manpower workers, Court President Barak stated that ‘it is worth harming human rights to preserve a social structure that protects human rights’.¹¹³

The relevance to our current discussion is made explicit by the fact that the ISC supported the above statement with a reference to another case – *Kontram v Ministry of Treasury*¹¹⁴ – which, somewhat surprisingly, ‘is considered an important contribution to the emergence of social rights in the [Israeli] Supreme Court’.¹¹⁵ The case involved an administrative matter of licensing, quite unrelated to social rights. Zamir J does suggest that ‘human rights are, indeed, of supreme importance’.¹¹⁶ But he continues:

But that is just one role [of the government] . . . In fulfilling our role, each of us must accept a system of responsibilities, not only towards other individuals, but also towards society in general . . . That is how I perceive the social contract.¹¹⁷

The quote is important, I believe, because the language placing ‘rights besides duties’; ‘no rights without responsibilities’;¹¹⁸ and rights as ‘social bargains’ or ‘community assets’¹¹⁹ forms and informs the judicial manifestation of the social contract version that is currently in vogue.¹²⁰

In particular, positing rights against general welfare, and rights against social justice, allows even those who express support for SW rights to subject them to general interest. The following quote, from Court President Barak, is part of that particular agenda: ‘the normative status and scope of the right to social security . . . is derived from the nature of the economic and social regime that governs a certain society . . . It expresses the economic strength of its market’.¹²¹ It would seem difficult to offer a better example to support Simmonds’ warning that rights may end up serving merely as place holders for forms of protection, that are ‘balanced against countervailing considerations, so that the protections that finally result are the outcome of this calculus of conflicting reasons’.¹²² The natural result, per Simmonds and others, is that ‘rights or the interests of the right-holders would play no *strategic* role in moral and political affairs’.¹²³ While this proposition seems somewhat extreme as a general assessment, it has merit insofar as SW rights discourse in Israel (and elsewhere) is concerned.

¹¹¹ I refer to the ‘interest theory of rights’. See, eg J Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford, Clarendon Press, 1995) 44–55.

¹¹² *Manor* (n 107) 740. The passage was quoted approvingly in HCJ 4947/03 *Be’er Sheva Municipality v Government of Israel* (10 May 2006), Nevo Legal Database (by subscription) para 11 (in Hebrew) (confirming a law abolishing tax benefits to cities in the south of Israel).

¹¹³ HCJ 450/97 *Tnufa v Minister of Labour and Welfare* 52(2) PD 433, 441 [1998] (in Hebrew).

¹¹⁴ HCJ 164/97 *Kontram v Ministry of Finance* 52(1) PD 289 [1998] (in Hebrew).

¹¹⁵ Barak-Erez and Gross, ‘Social Citizenship’ (n 37) 247.

¹¹⁶ *Kontram* (n 114) 340.

¹¹⁷ *ibid.*

¹¹⁸ A Giddens, *The Third Way and its Critics* (Cambridge, Polity Press, 1998) 65–66; A Gewirth, *The Community of Rights* (Chicago, University of Chicago Press, 1996) 42, 223, 231–35.

¹¹⁹ Holmes and Sunstein (n 10) 217.

¹²⁰ See, eg Michelman, ‘The Constitution’ (n 6) 26–30.

¹²¹ HCJ 494/03 *Physicians for Human Rights v Minister of Finance* 59(3) PD 322, 333–34 [2004] (in Hebrew).

¹²² Simmonds (n 110) 160.

¹²³ J Chan, ‘Raz on Liberal Rights and Common Goods’ (1995) 15 *OJLS* 15, 29.

The important point here is the conceptual one. It is expressed in the ISC's succinct statement that, in some cases, 'where there is no budget, there is no right'.¹²⁴ It should be made clear that the Court does not express the obvious truth that budgetary considerations may limit the *implementation* of the right. Rather, it suggests that they are, as Dennis Davis argues when discussing South African cases, 'in effect . . . *defined* in terms of availability of resources'.¹²⁵ He refers to Chaskalson P's conclusion, according to which: 'access to housing, health care, food, water and social security are *dependent* upon the resources available for such purposes, and that the corresponding *rights themselves* are limited by reason of the lack of resources'.¹²⁶

VII. CONCLUSION

Despite assertions to the contrary, objections to SW rights have not disappeared. In fact, the current divide between SW rights and traditional, CP rights, seems wider than ever. The explanation for this curious situation, this chapter argued, lies in the fact that while the original objections were found unconvincing on their face, their contemporary versions capture the sign of the times: the market, consumer–citizenship paradigm. Costs, budgets and economic criteria are naturally central to this paradigm and thus re-enforce arguments that were on the verge of extinction. But history had a different idea in mind, and not for the first time. Over 200 years ago, Jeremy Bentham wrote of the social contract: 'I was in hope . . . that this chimera had been effectively demolished by Mr Hume. I think we hear not so much of it now as formerly'.¹²⁷ So now, insofar as paradigms supporting social policy are concerned, we hear of little else other than the social contract. And as the previous part of this chapter hypothesised, this paradigm, along with its derivatives, are playing a role in forming the new challenge for advocates of SW rights.

¹²⁴ *Louzon* (n 61) para 16.

¹²⁵ Davis (n 60) 197; also Gross (n 105) 316; D Davis, P Macklem and G Mundlak, 'Social Rights, Social Citizenship and Transformative Constitutionalism: A Comparative Assessment' in J Conaghan, M Fischl and K Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford, Oxford University Press, 2002) 511, 523–24.

¹²⁶ *Soobramoney v Minister of KwaZulu Natal* 1997(12) BCLR 1696 (CC) 8, para 11.

¹²⁷ J Bentham, 'A Fragment on Government or a Comment on the Commentaries' in JH Burns and HLA Hart (eds), *Collected Works of Jeremy Bentham* (London, Athlone Press, 1977) 393, 439.